

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
ALBERT BALLESTRASSE AND HERNANDO )  
CHAVES AND ASSOCIATES, )

Appellants, )

v. )

STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY AND WALCZAK )  
SPRINGS WATER SYSTEM, )

Respondents. )

PCHB Nos. 78-51 and 78-80

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

These matters, the appeal of a denial of an application for a permit to appropriate surface waters and the appeal of a Cease and Desist Order, came before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith on May 31, 1978 in Seattle. David Akana presided.

Appellant, Ballestrasse, was represented by his attorney, Nelvin Bettis; appellant, Chaves, appeared pro se; respondent was represented by Robert E. Mack, Assistant Attorney General.

1 The appeal of the order to cease and desist using water from  
2 certain facilities is the subject matter of PCHB No. 78-80. Therein,  
3 appellant Chaves requested a stay of enforcement of the order until  
4 the outcome of the hearing regarding an application for a permit  
5 to appropriate water, which is PCHB No. 78-51. The request for a  
6 stay became moot by the action of respondent, Department of Ecology,  
7 which stayed its order until June 30, 1978.

8 After an unsuccessful informal conference in PCHB No. 78-51,  
9 the hearing proceeded. Witnesses were sworn and testified; exhibits  
10 were admitted.

11 Having heard the testimony, having examined the exhibits, and  
12 having considered the contentions of the parties, the Pollution Control  
13 Hearings Board makes these

#### 14 FINDINGS OF FACT

##### 15 I

16 On June 28, 1976 appellant Ballestrasse, through his consulting  
17 engineer, Hernando Chaves and Associates, made application to the  
18 Department of Ecology (hereinafter "DOE") for the appropriation of  
19 163 gallons per minute (gpm) of water to service 100 residential homes  
20 from Walczak Springs located about six miles northwest of Enumclaw in  
21 King County.

##### 22 II

23 Notice of the application was duly published on July 29 and  
24 August 5, 1976 from which came one protest to the application. The  
25 protestant, who holds a Certificate of Surface Water Right for  
26 domestic and stockwatering use, has since connected to the appellant's  
27 community system. After notifying appellant of the protest, DOE took

1 no further action on the application until March, 1977, when it  
2 received a complaint from a farmer.

3 III

4 Following the filing of the application with the DOE, appellant  
5 designed a water system for the site and submitted it to the State  
6 Department of Social and Health Services (DSHS). Ordinarily, DSHS  
7 will not approve new water source plans without evidence of a permit  
8 for water appropriation issued by DOE. In this case, however, the  
9 plans and source were approved in August of 1976 by the DSHS agent after  
10 it appeared from his conversations with DOE's agent that the only serious  
11 objection to the application--those of the Departments of Fisheries  
12 and Game--had been dropped. Appellant commenced construction of the  
13 community water system in August of 1976. Approval for thirty-five  
14 homes was given by King County Building and Land Use Department and of  
15 this number, there are ten present domestic water users.

16 IV

17 On March 15, 1977, in response to a complaint from a riparian  
18 dairy farmer, DOE visited the site and discovered the presence of  
19 appellant's diversion facilities. Appellant was advised of the  
20 necessity for an approved permit to withdraw water. From subsequent  
21 visits to the site and to Newaukum Creek, respondent's agents variously  
22 estimated that from 47,120 (using a measuring device) to 485,280 (using  
23 crude estimates) gallons of water per day may be available from the springs.  
24 Appellant, on the other hand, estimates that 720,000 gallons of water per  
25 day would be available and that thirty-five homes would require only  
26 22,500 gallons of water each day.

27 FINAL FINDINGS OF FACT,  
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1 V.

2 Newaukum Creek and its tributaries have been administratively  
3 closed to consurptive uses, except individual domestic use, since  
4 September, 1951. The closure was and is deemed necessary to prevent  
5 further reduction of coho salmon population caused by low summer  
6 flows in the creek.

7 VI

8 Although appellant's application states otherwise, DOE's maps  
9 do not show that the springs were tributary to Newaukum Creek and,  
10 as such, a field examination was indicated. Such examination disclosed  
11 that the springs did in fact feed the unnamed tributary to Newaukum  
12 Creek.

13 Because of the connection to the creek, the Departments of  
14 Fisheries and Game each requested that appellant's application for  
15 permit be denied.

16 VII

17 Four farmers claim riparian rights to the unnamed tributary to  
18 the creek which provides water for about 300 head of cattle. Although  
19 each cow requires from twenty to thirty-five gallons of water per  
20 day, the water in the unnamed tributary must be kept flowing to  
21 prevent disease found in stagnant water at the site. There  
22 have been instances where cattle drinking from the stream have been  
23 stricken with the disease and further appropriation of water which  
24 reduces stream flow concerns at least one major riparian farmer.

25 VIII

26 After considering the requests of the Departments of Fisheries  
27 FINAL FINDINGS OF FACT,  
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1 and Game which were received in October of 1977, and other uses of  
2 water by riparian farmers, the DOE on February 7, 1978 denied the  
3 application on the grounds that riparian rights for stockwatering  
4 would be impaired and that the fisheries resource would be  
5 detrimentally affected by lower flows to Newaukum Creek.

## 6 IX

7 Any Conclusion of Law which should be deemed a Finding of Fact  
8 is hereby adopted as such.

9 From these Findings the Board comes to these

## 10 CONCLUSIONS OF LAW

### 11 I

12 Appellant's burden, on an appeal of a denial of an application  
13 to appropriate water, is to show, by a preponderance of the evidence,  
14 that the DOE has erred with respect to the statutory determinations  
15 it must make under RCW 90.03.290 which are:

- 16 (1) What water, if any is available;
- 17 (2) To what beneficial uses the water is to be applied;
- 18 (3) Will the appropriation impair existing rights; and
- 19 (4) Will the appropriation detrimentally affect the public  
20 welfare.

21 Stemple v. Department of Water Resources, 82 Wn.2d. 109, 115 (1973).

22 We are not persuaded that appellant has carried this burden with  
23 respect to those reasons for denial given by the DOE, namely,  
24 impairment of existing rights and detriment to the fisheries resource.  
25 Accordingly, the DOE denial of the application should be affirmed.

### 26 II

27 Under the circumstances of this case, appellant's claim of  
estoppel is not well taken. While the long delay by the Departments

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1 of Fisheries and Game to verify the connection of the springs with  
2 Newaukum Creek, and DOE's long period of inactivity on the permit applica-  
3 tion appear unwarranted, appellant must, as he was aware, secure a permit  
4 to appropriate water. Although he made application for water, he  
5 did not have a permit to appropriate it. Such permit is necessary  
6 before any water can be taken. See RCW 90.03.400; .410.

7 III

8 Appellant is not without options to provide water to the community  
9 water system, however. He may seek to secure water from a public supply  
10 or seek ground water from wells.

11 IV

12 Any Finding of Fact which should be deemed to be a Conclusion of Law  
13 is hereby adopted as such.

14 From these Conclusions the Board enters this

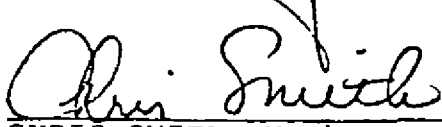
15 ORDER

16 The denial of the application for a permit to appropriate water  
17 is affirmed.

18 DATED this 9<sup>th</sup> day of June, 1978.

19 POLLUTION CONTROL HEARINGS BOARD

20   
21 DAVE J. MOONEY, Chairman

22   
23 CHRIS SMITH, Member  
24

25  
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